PUBLICITY RIGHTS AS A TOOL FOR PROTECTION OF CELEBRITIES AND PUBLIC FIGURES IN KOSOVO

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Currently, there is no special law for the protection of publicity rights in Kosovo, and a limited protection can be only afforded through different forms of intellectual property rights, i.e., trademark and copyright, as well as under the privacy protection and anti-defamation legislation, as well as property law regime. While the right to privacy and anti-defamation laws represent means to protect the human dignity, they are nevertheless not sufficient to justify an application of the right of privacy when the motives are to protect the commercial value of the persona. Hence the current paper aims at analysing the current regulation of publicity rights in Kosovo, as well as the scope of protection through a comparative analysis of the publicity rights legislation in different jurisdictions. The paper will also discuss the main policies and legal theories behind the right of publicity, explore different approaches expressed in the legal doctrine, and propose specific actions for Kosovo legislators in this regard.

Keywords: publicity rights; intellectual property; personality rights; privacy and publicity; Kosovo

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I. INTRODUCTION

Publicity right is generally defined as the right to prevent commercial use of one's identity.[1] As such, it is not expressly regulated in many jurisdictions, hence the definition, as well as the scope of such rights varies accordingly. In those jurisdictions where publicity rights are not regulated by special legislation, but rather by a fragmented one, there is a continuous battle over how these rights must be examined[2], and under which doctrine. Kosovo represents one such jurisdiction, where courts will likely have to rely on different remedies provided by different legal regimes such as property, intellectual property, privacy, and anti-defamation legislation to treat claims related to violation of publicity rights.

II. ADVENT OF THE RIGHT OF PUBLICITY

The right of publicity emerged from the right to privacy, and to better understand the former, one needs to look at the historical development of the latter one.

The right to privacy is universal and as such is enshrined in international instruments and national constitutional provisions as an absolute fundamental right. In the United States, the right to privacy, as a formal legal concept was introduced in the 19th century by advocates Samuel D. Warren and Louis D. Brandeis, who argued that the common law defamation law is not sufficient to guarantee the right "to be left alone" as it provides remedies only against measurable injuries, and not against injuries of person's intellect and feelings.[3] It was only in 1965 that the Supreme Court of the United States first recognized the right to privacy in Griswold v. Connecticut.[4] The importance of this case

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1 McKenna, M. P., *The right of publicity and Autonomous Self Definition*, University of Pittsburgh Law Review, *vol*. 67, no. 225, 2005, p. 232.

2 See Verbeke, C., *The Right of Publicity's Place in Intellectual Property Law,* Chicago Kent Journal of Intellectual Property Law, 2020, (https://studentorgs.kentlaw.iit.edu/ckjip/the-right-of-publicitys-place-in-intellectual-property-law/) (November 6, 2021).

3 Warren, S. D.; Brandeis, L. D., *The Right to Privacy*, Harvard Law Review, *vol*. 4, no. 5, 1890, p. 195.

4 Griswold v. Connecticut, 381 U.S. 479 (1965). See also *Griswold v. State of Connecticut*, Encyclopedia Britannica, https://www.britannica.com/event/Griswold-v-State-of-Connecticut (31 May 2021): The Supreme Court had to rule on "whether the Constitution protects the right of marital privacy against state restrictions on a couple's ability to be counseled in the use of contraceptives?" The Court ruled that "several provisions of the Constitution protect marriage as a sacred and private bond, and that the citizens (…) should enjoy the freedom to use birth control wit-

lies in the fact that it clarified that although the U.S. Constitution does not implicitly provide for the right to privacy, it nevertheless provides for an implied right to privacy.

Later, this right was further recognized by the courts and extended, through the enactment of the Privacy Act of 1974, to include among other rights, the right of individuals to control how information about themselves is collected and used.[5]

Under the Privacy Act of 1974, however, these legal rights focused on avoiding harm to such individuals, be it reputational or personal harm, but there was no recognition by the courts of celebrity images as legal rights *per se*.[6] The term "right of publicity" was used for the very first time, independently from the "right to privacy", in the *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.* case[7], where the court ruled that "in addition to and independent of the right of privacy, a man has a right in the publicity value of his photograph, and this right might be called a right of publicity".[8] In this case, a baseball player entered into a contract with Haelan Laboratories, Inc. ("Haelan"), that provided the latter with the exclusive right to use the player's photographs in connection with Haelan's gum sales. The contract also provided that during the entire term of the contract, the player was prohibited from granting similar rights to any other gum manufacturer, whereas Haelan, had an option to extend the term of the contract. Despite this, the player entered a contract with another gum manufacturer, Topps Chewing Gum, Inc. ("Topps"), a rival of Haelan, thus granting similar rights to Topps in connection with sales of Topps' gum either during the original or extended term of Haelan's contract. Haelan filed a lawsuit against Topps alleging that it had induced a sports figure to breach his contract allowing Haelen the exclusive right to market his photograph. The Federal District Court dismissed Haelan's complaint and Haelan appealed.[9] Topps argued that Haelan had no legal right to sue because the image rights of the

hin the bond of marriage".

5 Privacy Act, 5 U.S.C. § 552a (1974).

6 Dogan, S., *Haelan Laboratories v. Topps Chewing Gum: Publicity as a Legal Right*, in: Dreyfuss, R. C.; Ginsburg, J. C. (ed.), *Intellectual Property at the Edge: The Contested Contours of IP 17*, 2014, https://scholarship.law.bu.edu/faculty_scholarship/151.

7 Haelan Laboratories, Inc. v. Topps Chewing Gum Co., 112 F. Supp. 904 (E.D.N.Y. 1953).

8 Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 1953 U.S. App. LEXIS 4294 (United States Court of Appeals for the Second Circuit February 16, 1953, Decided), advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-YR40-003B-02RY-00000-00&context=1516831 (11 May 2022).

9 *Ibid.*

player were personal to the player, and there were no property rights at stake, which could have been transferred through contract.[10] Under this argument, Topps alleged that it was only the player who could have brought such legal action, if Topps had exploited his image for commercial purposes without his consent[11], and it was based on exactly this argument that the Federal District Court dismissed Haelan's complaint.[12] The Federal District Court agreed with the argument that these rights are inalienable. Upon the appeal, the Second Circuit Court of Appeals recognized "property interest" in the player's image, as an independent right to that of privacy right[13], and ruled that it is transferable just like any other property right.

Although the epilogue of this case has caused some debates in academic circles, whereby some authors perceive this decision as falling "short of normative rationale, and utterly lacking in an examination of potential consequences"[14], or object to the privacy/property dichotomy that it has created[15], some other authors perceive it differently. Advocates of publicity rights argue that the reason why publicity rights emerged as a separate branch of law from the right to privacy is that the privacy-related claims are considered personal, whereas publicity-related claims are of a property nature and hence are considered commercial, and therefore "the privacy doctrine is inadequate to remedy commercial uses of persons' identities and likeness, especially when such persons are deemed celebrities".[16]

Today, the right to privacy, or else known as the right "to be left alone", is recognized as the concept that one's personal information is protected from public scrutiny and is protected as a fundamental human right under the Universal Declaration for Human Rights (UDHR).[17] Whereas the right to publicity has its foundations on the principles of invasion of privacy and is acknowledged as an independent type of claim that a person can make when his or her

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10 Gordon Hylton, J., *Baseball Cards and the Birth of the Right of Publicity: The Curious Case of Haelan Laboratories v. Topps Chewing Gum*, Marquette Sports Law Review, *vol*. 12, 2001, p. 285

11 See *ibid*., pp. 284-285. This practice was barred by the New York Civil Rights Law, as well as the Privacy Act of 1975.

12 *Ibid.*, p. 286.

13 Haelan Labs., Inc., 202 F.2d, at 868.

14 Dogan, S., *op. cit*. (fn. 6).

15 Young Choi, A. E., *Book review: The Right of Publicity: Privacy Reimagined for a Public World, by Jennifer E. Rothman,* Osgoode Hall Law Journal, *vol*. 57, no. 1, 2020, p. 279.

16 McKenna, M. P., *op. cit*. (fn. 1), p. 244.

17 United Nations, Universal Declaration of Human Rights (UDHR), 1948, https://www.un.org/en/about-us/universal-declaration-of-human-rights (12 May 2022).

likeness/name is used for commercial purposes.[18]

Under the right of publicity, one can control the "commercial exploitation of a person's name, image, or persona" and is a right associated mainly with celebrities, and public figures, but can also be invoked by any other person who is not necessarily a celebrity or a public figure. Any unauthorized use of the image, name, or persona of someone, for commercial purposes, is an infringement of the right of publicity.

In Europe, the right to publicity, or personality, is still mostly treated under the right to privacy, in accordance with the European Convention on Human Rights (ECHR), and it is widely applied under the jurisprudence of the European Court of Human Rights (ECtHR). Article 8 of the ECHR provides for the right to respect for private and family life, home, and correspondence, whereas ECtHR has defined the scope of this article broadly. Concerning the right to respect for private and family life, the ECtHR on many occasions clarified that the concept of private life extends to aspects relating to personal identities, such as the person's name, photo, or physical and moral integrity, and that it also embraces multiple aspects of a person's identity, such as, among others, name or elements relating to a person's right to their image.[19] However, Article 8 does not necessarily require monetary compensation to the victim if other redress mechanisms are put in place[20], and this is another reason why in some jurisdictions the publicity-related claims are treated separately.

III. RIGHT OF PUBLICITY IN SELECTED COMMON LAW AND CIVIL LAW COUNTRIES

As the further analysis in this paper reveals, some countries in Europe have also treated the right of publicity as part of the right to privacy, and the case law exemplifies that publicity-related claims, very often, are averted by other rights guaranteed by the ECHR, namely the right to freedom of expression.[21] Some other countries, do not recognize such rights, but other legal remedies can be used under other legal regimes.

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18 McKenna, M. P., *op. cit.* (fn. 1), p. 244.

19 Guide on Article 8 of the European Convention on Human Rights: Right to Respect for Private and Family Life, Home, and Correspondence, Council of Europe, European Court of Human Rights, 2020, p. 39.

20 *Ibid.*, p. 41.

21 See for instance in Von Hannover v. Germany (No.2), 2012, (2012) 55 E.H.R.R. 15.

In Germany, there are the so-called personality rights, which have been developed by the case law of the Federal Supreme Court[22], and which protect two aspects of rights, namely general and specific personality rights[23], thus taking a dualistic approach, and differentiating between commercial and non-commercial parts of the personality. The right of personality hence consists of a non-commercial component, which may be called the right of privacy, and a commercial component, which may be called the right of publicity.[24] France has also a strong foundation in the right of personality, which also includes an acknowledgment of an economic interest in personality.[25] As a matter of fact, the notion of "personality rights" has developed in the French legal system[26], and as such, it comprises the one's exclusive right to use his/her image and prevent third parties from such usage (a positive right), and the right on one's image, allowing the person to commercially exploit his/her image.[27] Personality rights are recognized by the French Civil Code, Section 9[28], which is used by French courts as a ground for the protection of the right of publicity.[29] In Italy, the protection of personal images also comes under the category of personality rights[30], and such claims may be invoked either under the Civil Code or the Copyright Act. The right to publicity is, therefore, not expressly enumerated

22 See *Bundesverfassungsgericht* (BVerfG) (Federal Constitutional Court), 1 BvR 1696/98, Oct. 10, 2005, http://codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/ger/ger-2005-3-003?f=templates$fn=document-frameset.htm$q=%5Bfield,E_Thesaurus%3A05.03.21*%5D%20$x=server$3.0 (12 May 2022).

23 Moskalenko, K., *The right of publicity in the USA, EU, and Ukraine*, International Comparative Jurisprudence, *vol.* 1, no. II, 2015, pp. 115-116.

24 Von Welser, M., *Right of Publicity in Germany,* Lexology, 2019, (https://www.lexology.com/library/detail.aspx?g=2d450050-94dd-40e8-9bf1-a1798deac2a6 15 April 2022).

25 Greer, C. J., *International Personality Rights and Holographic Portrayals*, Indiana International and Comparative Law Review, *vol.* 27, 2017, p. 262.

26 Moskalenko, K., *op. cit*. (fn. 23), p. 116.

27 *Ibid.*; see also Logeais E.; Schroeder J., *The French Right of Image: An Ambiguous Concept Protecting the Human Persona,* Loyola Marymount University and Loyola Law School, 1998, http://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1366&context+elr (15 April 2022).

28 Code civil, *Journal Officiel de la Republique Francaise*, art. 9.

29 International Trademark Association (INTA), Right of Publicity State of the Law Survey, Right of Publicity (ROP) Committee, https://www.inta.org/wp-content/uploads/public-files/advocacy/committee-reports/INTA_2019_rop_survey.pdf (12 May 2022).

30 Grazioli, S., *Italy: Italy's Robust Image Rights Regime,* World Trademark Review, 2017, https://www.worldtrademarkreview.com/enforcement-and-litigation/italy-italys-robust-image-rights-regime (16 April 2022).

by statute, but comes as a judicial creation, which is supported by the Italian Civil Code.[31] In the Netherlands, image rights are limited to "depiction from which an individual is identifiable, i.e., body posture, corresponding facial features, and other identifiable elements". [32] The creator of a portrait has the right to publicity of that portrait.[33] Under Swedish law, on the other hand, there is an independent right to an individual's name or picture recognized by the Act on Names and Images in Advertising.[34] This Act provides that an individual's name or picture cannot be used in marketing without his/her consent.[35] Hence, in Sweden claims related to misappropriation of name and likeness are confined only to situations when they are used in marketing and without consent, whereas any use of name or likeness in other contexts can be claimed under trademark and copyright law, although their main purpose is not the protection of privacy and publicity interests, and therefore, their applicability is very limited.[36] The same is true for Denmark.[37] In Greece, the publicity right rests within the domain of the right of personality as recognized by the Greek Constitution and the Greek Civil Code, as well as other pieces of legislation such as the copyright law, trademark law, data protection laws, and laws relating to amateur and professional sport.[38]

Looking closely at the region, Croatia has also adopted the model whereby personality rights form part of the right to privacy, which is also guaranteed

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31 Martuccelli, S., *The Right of Publicity under Italian Civil Law*, Loyola of Los Angeles Entertainment Law Review, *vol.* 18 no. 3, 1998, p. 546.

32 Maastricht University, *Portrait Rights, Communications Guide*, https://www.maastrichtuniversity.nl/support/communications-guide/images/portrait-rights (16 April 2022).

33 Netherlands Institute for Arts History, RKD, *Copyright*, https://rkd.nl/en/products-and-services/image-request/copyright (16 April 2022).

34 Möller, K. O., *In brief: sponsorship and image rights of professional athletes in Sweden*, Nordia Law, Lexology, 2020, https://www.lexology.com/library/detail.aspx?g=09d9b264-f8c8-4a66-924a2dec79e04474#:~:text=Swedish%20law%20recognises%20an%20independent,Advertising%20(the%20Names%20Act) (16 April 2022).

35 Åhsberger, F.; Lindgren, K., *Advertising and Marketing in Sweden*, Lexology, 2019, https://www.lexology.com/library/detail.aspx?g=65005423-2c5e-4bc4-8a53-3472e7c11910 (17 April 2022).

36 Helling, A. E., *Protection of "Persona" in the EU and in the US: a Comparative Analysis*, LLM Theses and Essays, 2005, p. 67.

37 See Hilliger, L.; Bro, M., *In Brief: Sponsorship and Image Rights of Professional Athletes in Denmark*, Lexology, 2020, https://www.lexology.com/library/detail.aspx?g=f-0c4182d-b95d-4094-a145-9dbf4d2c4092 (17 April 2022).

38 See: Paparrigopoulos, X.; Koliothomas, A.; Mabger D., *Greece*, in: *Right of Publicity in 17 jurisdictions worldwide*, Getting the Deal Through, London, 2012, pp. 36-39

by the Constitution of the Republic of Croatia.[39] Personality rights are also defined in Article 18 of the Croatian Law on Obligations, which provides that "personality rights are understood to be the right to life, to physical and mental health, reputation, honour, dignity, name, the privacy of personal and family life, freedom, and other."[40] Article 1100 of the Croatian Law on Obligations, provides for a legal basis to seek a just pecuniary compensation, as well as compensation for material damage, and there are also remedies available under Article 1048, whereby "any person may request from the court or another competent authority to order a termination of the activity which violates his privacy rights and elimination of its consequences."[41] Croatian jurisprudence in this regard dates back as far as the 60s, when Croatian courts enforced personality rights[42], hence it is only right to say that personality rights in Croatia have also evolved through court practice.

In the United States, commercial use of one's likeness can be protected either as a trademark, under the federal trademark law, known as the Lanham Act[43], under state publicity rights laws, or as common law[44], although not all states have publicity rights statutes.[45] Under the Lanham Act, the likeness of the persona is protected as a trademark. Because there is no federal law protecting publicity rights, the Lanham Act being federal law provides for the needed jurisdiction for celebrities to protect their likeness, names, and images.[46] Under Section 43(a) of the Lanham Act, a celebrity (but also any other person regardless of the celebrity status)[47], can bring a false endorsement claim based on the unauthorized use of a celebrity's identity. A false endorsement occurs when a person's identity relates to a product or service in a way that consumers are likely to be misled about that person's sponsorship or approval of the pro-

39 Proso, M., *Pravo na publicitet u sportu,* Zbornik Pravnog fakulteta u Splitu, *vol*. 52, no. 4, 2015, p. 1079.

40 Article 18 *Zakon o obveznim odnosima*, Narodne novine, nos. 35/05, 41/08, 125/11.

41 Proso, M., *op. cit*. (fn. 39), pp. 1079-1080.

42 *Ibid*., p. 1080; see cases cited by the author: VSH, Gž 33/61 (26 January 1962), and VSH, Gž 2310/75 (25 April 1976).

43 The Lanham (Trademark) Act (Pub. L. 79–489, 60 Stat. 427, enacted July 5, 1946, codified at 15 U.S.C.

44 Schlegelmilch, J., *Publicity Right in the U.K and the U.S.A.: It Is Time for the United Kingdom to Follow America's Lead*, Gonzaga Law Review Online, *vol*. 1, 2016, p. 104.

45 See Right of Publicity, Statutes & Interactive Maps, https://rightofpublicity.com/statutes (17 April 2022).

46 Schlegelmilch, J., *op. cit*. (fn. 44), p. 105.

47 See for instance Hauf v. Life Extension Found., 547 F.Supp.2d 771, 777 (W.D. Mich. 2008).

duct or service.[48] This claim based on the Lanham Act is the federal equivalent of the right of publicity under state laws[49], although with notable differences because "a right of publicity claim does not require proof of falsity, whereas a false endorsement claim is expressly premised upon creation of a false impression of endorsement or affiliation in the minds of consumers between the advertiser's products or services and the celebrity."[50] The plaintiff has to prove the likelihood of confusion, which is a controlling factor because the purpose of the Lanham Act is to protect consumers from confusion, whereas the purpose of the publicity right is the protection of celebrities' inherent right to control the commercial use of their identity or persona.[51]

State publicity rights laws, on the other hand, provide for broader protection, as they protect both commercial and non-commercial aspects of likeness. The right of publicity protects an individual's actual identity, but not the characters and performances which are protected under copyright law, and it protects only commercial advertising and merchandising uses of persona.[52] There are around sixteen states that have enacted state laws on publicity rights[53] Out of these, in eight states the right of publicity is recognised under both state and common law.[54] There are many variances between these state laws in terms of scope of protection, duration, remedies, and defences/exceptions. For instance, under the Arizona and Louisiana laws, only soldiers may claim the statutory right of publicity (including a member of the armed forces who was killed in the line of duty).[55]

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48 ETW Corp. v. Jireh Pub., Inc., 332 F. 3d 915 - Court of Appeals, 6th Circuit 2003, 926.

49 Keller, B. P., *The Right of Publicity: Past, Present and Future*, 1207 PLI Corp. Law and Practice, Handbook, 2000, pp. 159-170.

50 Benjamin, B., *Grand Implications: The Use of Celebrity Look-Alikes in Advertising and the Interplay Between State Right of Publicity and Federal False Endorsement (Trademark Infringement) Claims*, Kilpatrick Townsend & Stockton LLP, 2019, https://www.jdsupra.com/legalnews/grand-implications-the-use-of-celebrity-52043/#:~:text=Falsity%3A%20a%20right%20of%20publicity,State%20v. (17 April 2022)

51 *Ibid.*

52 Korotkin, L., *Finding Reality in the Right of Publicity. Student Note*, Cardozo Law Review DeNovo, *vol*. 34, 2013, p. 275.

53 Louisiana, Nebraska, Nevada, New York, Ohio, Oklahoma, Pennsylvania, Puerto Rico, Rhode Island, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin.

54 See International Trademark Association (INTA), Right of Publicity State of the Law Survey, *op. cit.* (fn. 29).

55 *Ibid.,* Arizona & Louisiana.

The common law right of publicity is a law created by court decisions, and states like California, Connecticut, Georgia, Massachusetts, Michigan, Minnesota, Missouri, and others[56], provide for the common law right of publicity system. Under these systems, courts apply multiple-step tests where the plaintiff must allege misappropriation of his/her name and likeness.[57] The problem with the common law publicity rights system is that it gives rise to situations when different jurisdictions interpret similar cases differently, and by its nature, it provides for narrower protection of publicity rights. Unlike Europe and the United States, the United Kingdom does not provide any right to publicity, and as duly observed by *Stromholm* in its 'Comparative Survey on the Right of Privacy and Rights of Personality', there is no precise moment that would give us an indication as to when exactly did privacy rights in England emerge, and consequently publicity rights.[58] There is a limited scope of publicity rights in the U.K., as such rights are not explicitly recognized, however, a limited amount of protection is available under other bodies of law, including various intellectual property laws and personal and business torts.[59]

In general, there is no unique protection system for the publicity rights either within the European Union or among different jurisdictions, be it civil or common law, and the definition, as well as the scope of protection of those rights, varies from country to country.

Rules governing publicity rights are quite fragmented and divergent, as they are based on different legal theories, and this poses several serious implications for both the courts as well as the interested parties in pursuing their rights. These divergences become especially disruptive considering possibilities offered by technologies that enable cross-border dissemination of images in the blink of an eye.

Reasons, why different jurisdictions have not enacted special rules governing publicity rights, are linked to a few policy considerations, which until now, have been broadly debated among academic circles, and there have been voices that supported as well as disagreed regarding the appropriate profile of

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56 *Ibid.*

57 White v. Samsung, 971 F.2d 1395, 1397 (9th Cir. 1992): in this case, the court applied a four-step test where the plaintiff had to allege 1) the defendant's use of plaintiff's identity; 2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; 3) lack of consent; and 4) resulting injury.

58 Stromholm, S., *Right of Privacy and Right of Personality*, P.A. Norstedt & Soners Forlag, Stockholm, 1967, p. 26.

59 Stallard, H., *The Right of Publicity in the United Kingdom*, Loyola of Los Angeles Entertainment Law Review, *vol*. 18, no. 3, 1998, p. 565.

the right.[60] First of all, the prevailing legal theories which serve as a basis for the protection of property rights of one's likeness, differ from country to country.

Among concerns raised regarding the publicity rights is that they create interest in elements of personal identity (proprietary rights), thus conferring both positive and negative rights for celebrities and public figures, and not only. Positive rights entail that a person can exploit his/her likeness for commercial purposes, whereas negative rights entail that a person may control how his/her likeness is used by others. Because publicity rights have emerged from privacy rights, an aspect that deals with rather personal rights, the line between what is public and private is often blurred.[61] This is because the protection of a person's image often takes a dual form based on the privacy/property dichotomy.[62] In her book, Jennifer E. Rothman contests the divergence that *Healan Laboratories v. Topps Chewing Gum* in the United States has created between the right to privacy and the right to publicity.[63] On the other hand, Jeremy Sheff in his remarks addressed at the Kernochan Center's Symposium "Owning Personality: The Expanding Right of Publicity", which was held on 19 October 2019 in Columbia, said that the rights of publicity and the rights of privacy are two different things and that they have been lumped together for odd historical reasons.[64] The place of the publicity rights has not been quite established yet, and for as long as these variances are present about its existence as well as the scope and definition, it will continue to remain a very fragmented field of law.

Another concern raised by Jeremy Sheff regarding publicity rights is that its scope is problematic because "it does not seem to have any limiting principle built into it in terms of the positive definition of the right, as contrasted with negative limitations imposed in service of other policy interests such as freedom of expression."[65] While some countries base their justification for legal protection of publicity/personality rights on John Locke's theory of property rights, other countries use as justification either prevention of unjust enrichment, false endorsement, or economic incentives, for that matter. Consequently, depending on the type of justification, publicity/personality rights are either recognized as a special category of rights or are treated within confines of the

60 See Leenheer Zimmerman, D., *Who Put the Right in the Right of Publicity?*, DePaul Journal of Art, Technology, and Intellectual Property Law, *vol*. 9, no. 1, 1998, p. 36.

61 Stromholm, S., *op. cit.* (fn. 58), pp. 65-74.

62 Synodinou, T., *Image Right and Copyright Law in Europe: Divergences and Convergences*, Laws, no. 3, 2014, p. 182.

63 Young Choi, A. E., *op. cit*. (fn. 15), p. 279.

64 Sheff, J., *Scope and Justification of the Right of Publicity*, Columbia Journal of Law & the Arts*, vol.* 42, 2019, p. 333.

65 *Ibid*., p. 333.

right to privacy, or are regulated by intellectual property laws, which share some same justifications. The publicity rights, hence, do not have a place of their own as they cannot be based on entirely one set of justification. A rationale for recognizing and granting, and/or denying personality rights may vary on a case-to-case basis, and sometimes it is the labour justification, and sometimes it is unjust enrichment or false endorsement, but they are never altogether. And this to some extent validates the situation and answers the question as to why there is no uniform recognition of publicity rights, and why individual countries are unwilling to enact special legislation governing publicity rights or give it a defined scope.

The International Trademark Association (INTA) has been advocating for years for the harmonisation of rights of publicity laws across many jurisdictions and its Right of Publicity Committee (ROP) adopted in 2019, a resolution, which sets forth some minimum standards for the right of publicity.[66]

The resolution calls for a federal right of publicity law, which would amend the Lanham Act, and it would, among others, "pre-empt all state laws, both statutory and common law; harmonise the divergent laws of various states in a manner that recognises the principles underlying the right of publicity by providing for a descendible and transferable right of publicity for a fixed term after death without regard to whether their rights were exploited during a person's lifetime; …protect the public's interest by exempting from liability, uses of persona that meets fair use/First Amendment standards for uses such as, without limitation, news, biography, history, fiction, commentary, and parody."[67] The resolution also stresses the need for the creation of a basic set of standards applicable worldwide and a set of minimum standards is also put forward in this regard as well, in terms of aspects protected, terms, remedies, and exceptions[68], which could be taken into account by the legislators from different jurisdictions when rethinking the position of rights of publicity in legal systems.

66 International Trademark Association (INTA). Right of Publicity Minimum Standards, March 27, 2008, https://www.inta.org/wp-content/uploads/public-files/advocacy/board-resolutions/Right-of-Publicity-Minimum-Standards-03.27.2019.pdf.

67 *Ibid*., p. 1.

68 See *ibid*., p. 2.

IV. REVIEW OF CURRENT KOSOVO LEGAL FRAMEWORK CONCERNING PROTECTION OF PUBLICITY RIGHT

Similarly, to European countries, Kosovo's legal framework does not regulate the right of publicity *per se*. There is no special legislation on publicity rights, and consequently, there is no clear legal basis for protecting an individual's property right in his/her persona. The Constitution of the Republic of Kosovo, however, guarantees fundamental rights and freedoms recognized by the ECHR, since it has incorporated the ECHR into its national legal system and made it mandatory for Kosovo courts, as well as the Constitutional Court of Kosovo to consider the jurisprudence of the ECtHR.[69] Consequently, one can say that Kosovo has embraced the model of personality rights, which are protected within the general concept of the right to privacy, as an absolute fundamental right guaranteed by the Kosovo Constitution.[70] Because Article 53 of the Constitution provides that the guaranteed human rights and fundamental freedoms shall be interpreted consistent with the court decisions of the ECtHR, it follows that non-commercial parts of the personality form part of the right to privacy (including the right to dignity[71] enshrined in Article 23 of the Constitution), consistently with the interpretation of the ECHR, whereas remedies for unauthorized exploitation of commercial parts of the persona must be observed elsewhere. One such place in the Kosovo Constitution is Article 46, which guarantees the right to own property, including intellectual property rights. Of equal relevance is also Article 40 of the Constitution, which guarantees the freedom of expression and provides for limitations to the right to privacy. It follows that Kosovo has also embraced a dualistic approach when it comes to publicity/personality rights, although its primary legislation falls short in many aspects in terms of protection of economic interests over the likeness and image

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69 Note: Although Kosovo is still not a member of the Council of Europe. See Article 22 (2), *Kushtetuta e Republikës së Kosovës* (Constitution of the Republic of Kosovo), *Gazeta Zyrtare e Republikës së Kosovës* (Official Gazette of the Republic of Kosovo), No. 04/2008.

70 *Ibid*. Article 36: "(1) Everyone enjoys the right to have her/his private and family life respected, the inviolability of residence, and the confidentiality of correspondence, telecommunication, and other communication".

71 The right to privacy is often referred in relation to other fundamental rights such as dignity. While dignity is not mentioned under the Convention itself, under ECtHR practice it is largely mentioned, because parties and the court referred to it. In most cases human dignity is mentioned in the context of a violation of some of the most fundamental rights, however, the so-far practice indicates that the context may imply several types of violations. For example, protection of privacy can be based on the protection of dignity.

of celebrities and public figures.

However, before dwelling on the existing legal framework, it is important to first briefly elaborate on the notion of VIPs (very important persons), which has emerged in Kosovo during the last two decades, and which as a term is used to refer mainly to actors, singers, make-up artists, fashion designers and even social media influencers (showbiz world). A famous Kosovo writer, Albatros Rexhaj[72], has, a couple of years ago, raised some important questions on his blog on Facebook[73], such as whether several names from the Kosovo and Albanian showbiz should be regarded as VIPs, and who should endorse their VIP status?

Regarding the meaning of "VIP", the Merriam-Webster dictionary defines it as a "person of great influence or prestige", and "high official with special privileges".[74] The Cambridge Dictionary defines the term "VIP" as "a person who is treated better than ordinary people because they are famous or influential (= they have a lot of influence) in some way".[75] From these definitions, it follows that famous people in the industry of film, music, and fashion can be considered VIPs, but also influencers who become famous through social media or other channels, and who create an economic value for their persona. Hence, there is no need for any endorsement because the demand from the public for their likeness and image is an endorsement. Whether it is fair that the worth of such persons and their likeness is higher than that of teachers, professors, scientists, and reputable authors, a debate that followed regarding the questions raised by Albatros Rexhaj, is a matter of value system. However, for purposes of the publicity rights considerations, if a person's image has acquired an economic value, he/she can commercialize his/her image and should be able to control how his/her image is exploited by others. Consequently, such a person shall have legal remedies at disposal to protect his/her likeness from unauthorized commercial exploitation.

A recent case of a famous Kosovo actor Adriana Matoshi, who is also a member of the Kosovo Parliament and is very present in public life and on social media, is a good example to take for analysing the existing legal framework in

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72 Albatros Rexhaj is an Albanian writer, born in 1975 in Prizren, and author of several theatrical dramas and books.

73 Personal blog: Urban Philosophy of Albatros Rexhaj, which can be found at the Facebook page: https://www.facebook.com/filozofia.urbane/.

74 Merriam-Webster Dictionary found at: https://www.merriam-webster.com/dictionary/VIP.

75 Cambridge Dictionary found at: https://dictionary.cambridge.org/dictionary/english/vip.

Kosovo for the protection of publicity rights. Few cosmetic companies have recently used, without authorization, Adriana Matoshi's image in their commercials for purposes of increasing the sale of cosmetic products. She protested on social media against this act of the cosmetic company and threatened to sue[76], but the question remains if she decides to sue, on what basis she can be successful. The analysis of the case law of Kosovo courts up to date indicates that most of the claims related to unauthorized use of one's identity for non-commercial purposes, and such claims were based on anti-defamation law. But then, what other legal basis there exists for publicity rights in Kosovo?

Protection of identity, personality, and dignity via personal name. Some basic legal grounds for protection of the personal name and through it the identity, personality, and dignity of the person itself are provided under provisions of Law No. 02/l-118 on Personal Names. This law regulates the meaning, composition, procedure, and manner for determining and using the (personal) names in Kosovo.[77] Article 3 (1) provides that: "A personal name shall guarantee and protect citizen's identity, personality, and dignity." Although, the regulation is not expressive itself in the context of the right of publicity, provisions of Article 3 are important in the context of protection of integrity and dignity of a persona, as a personal right. Furthermore, as provided under Article 3(2) of the same law, the personal name is considered a personal right, and the identification of a person as well as distinction with other persons is made possible *via* personal name.[78] Therefore, any publication of one's name or information about his/her personality without his/her consent, regardless of the purpose, including commercial exploitation, may constitute a violation of one's identity, personality, and dignity. There are no remedies provided under this law, however, such remedies can be sought under other bodies of law, such as the Law on Obligations i.e., request to cease infringement of personal rights[79], as well as claims for just monetary compensation, and unjust enrichment can be made.[80]

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76 24News. News article: *Ia keqperdorin imazhin e fytyres pa miratimin e saj, Adriana Matoshi iu reagon kompanive: Do t'i bini pishman*, posted on 16 April 2022, https://news65media.com/ia-keqperdorin-imazhin-e-fytyres-pa-miratimin-e-saj-adriana-matoshi-iu-reagon-kompanive-do-ti-bini-pishman/?fbclid=IwAR3MKzFxUbfm-cndM_wzzdUZMlRHRl2jUKFjmx712TvqlpRbYlgVlH67GqU (17 April 2022).

77 Art. 1, Law No. 02/L-118 *Ligji për Emrin Personal* (Law on Personal Names), *Gazeta Zyrtare e Republikës së Kosovës* (Official Gazette of Republic of Kosovo), No. 35/15.

78 *Ibid*. Art. 3 (3.1, 3.2).

79 Art. 139, Law No. 04/L-077 *Ligji për Marrëdhëniet e Detyrimeve* (Law on Obligational Relationships), Gazeta Zyrtare e Republikës së Kosovës (Official Gazette of the Republic of Kosovo), No. 16/2012.

80 *Ibid.* Art. 194.

Prohibition of infringement of personal rights, the right to request the cessation of infringement, and the right to monetary compensation for immaterial damages. Kosovo Law on Obligational Relationships provides the basis for requests to cease infringement of personality.[81] Provisions of Article 139 are the most relevant ones and may apply to infringements of the inviolability of the human person, personal and family life, or any other personal right. Although provisions of Article 139 are primarily focused on the cessation of the infringing activity, several provisions provide the basis for monetary compensation to the affected person. Article 182 of LOR provides for a possibility to seek reimbursement for immaterial damages. Just monetary compensation shall pertain to the injured party for the defamation of good name or reputation or truncation of a personal right.[82] Provisions of Articles 139, 182, and 183 of LOR may be interpreted in connection with those on unjust enrichment. Therefore, one can say that in the case of commercial benefit, or any other material benefit gained because of a violation of any personal rights, the obligation to return or compensate the value of the benefit achieved may be possible. The general right of personality can be enforced under civil law on several legal grounds, as provided above. The infringed person may claim damages as well as reimbursement of unjust enrichment under the rules of the Law on Obligational Relationships.

Protection of personality rights in case of intentional publication of untrue facts. Personality rights are also protected under anti-defamation law; however, such protection is related to the cases of intentional publication of untrue facts, or injuries to the reputation of a person, regardless of whether such use was done for commercial purposes, or not. Therefore, an action for the appropriation of personality can only succeed where the defendant intended to infringe. None of these legal grounds provide clear remedies to redress the commercial use of celebrities' identities, during her/his life and after her/his death. Furthermore, the status of identity appropriation claims as personal claims constrains courts' ability to use privacy doctrine to redress commercial uses of celebrities' identities in other contexts as well.

Kosovo copyright legislation. Kosovo Copyright and Related Rights Law (LCRR) (2011) as well as its amendments in 2016 and 2019 does not provide any legal grounds for protection of the right of publicity. While the focus of copyright law is on the protection of the works of authors in literature, science, and arts[83], these provisions do not provide for any possibility of an individual

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81 *Ibid.* Art. 139 (1).

82 *Ibid.* Art. 183.

83 Art. 5 and 8, Law No. 04/L-065 *Ligji për të Drejtat e Autorit dhe të Drejtat Tjera të Përafërta* (Law on Copyright and Related Rights), *Gazeta Zyrtare e Republikës së*

to control her/his name, face, image, or voice for commercial purposes. The Kosovo Copyright Law does not provide for any "portrait" rights either, as is the case with the Scandinavian countries. The law protects the moral rights of the author; however, such protection is related only to her/his work.[84] The moral rights of the author including the right of recognition of authorship and the right of integrity of work do not have any time limit.[85] There are differences in the scope of protection of copyright and the right to publicity. The first one protects the rights in intellectual creation, while the privacy and publicity rights protect the interests of the person who may be the subject of the intellectual creation.

Protection of personal names and signs as registered trademarks. According to Kosovo Law on Trademarks, the person may be the owner of a trademark.[86] Furthermore, based on Article 5 of the Trademark Law, a trademark may be any sign with a distinctive character, which can be represented graphically, including "personal names".[87] Portrait marks (i.e. a photographic image of one's face), depicting the image and likeness of a persona can also be registered as a trademark, and although they are not specifically mentioned under the Kosovo Law on Trademarks, they can be granted registration provided that they meet other statutory requirements. For instance, in the case Case R 2063/2016-4, the Board of Appeals of the European Union Intellectual Property Office (EUIPO) ruled that "the image of a specific individual, with her unique facial features, can be registered as a trademark as it can be perceived as a designation of the commercial origin of the goods or services concerned, enabling the relevant public to distinguish, without any possibility of confusion, the goods or services of the holder of the trademark from those which have a different commercial origin".[88] Therefore, personal names and images are protected once registered as a trademark, providing to its holder the full exclusivity on the trademark, and preventing others to use the trademark without his/her permission. This includes the prevention to use any identical sign with the trademark, any identical or similar sign, which creates the likelihood of confusion of association between the sign and the trademark. The Kosovo Law on Trademarks is silent

Kosovës (Official Gazette of the Republic of Kosovo), No. 27/2011.

84 *Ibid.* Art. 4 (1.5).

85 *Ibid*. Art. 64.

86 Art. 4 (2), Law No. 04/L-026 *Ligji për Markat Tregtare* (Law on Trademarks), *Gazeta Zyrtare e Republikës së Kosovës* (Official Gazette of the Republic of Kosovo), No.10/2011.

87 *Ibid*. Art. 5; this is only an indicative list and non-exhaustive list of signs which can be protected as a trademark.

88 16/11/2017, R 2063/2016-4, Device (Photo) of the Head of a Woman (fig), at 33.

concerning the protection of unregistered trademarks, however, it is possible under the law to file an opposition and invalidation actions based on well-known marks, since they enjoy protection according to Art. 34 of the Law on Trademarks.[89] Article 7 of the Law on Trademarks provides that a sign shall not be registered as a trademark if it is identical or similar to an earlier trademark and registration is sought for goods and services that are similar to the goods and services for which the earlier mark is registered if: the earlier trademark has a reputation in Kosovo; and the use of the latter trademarks, without reasonable cause, would take unfair advantage of, or be detrimental to, the distinctive character or the reputation of the earlier trademark.[90] Furthermore, according to Art. 52 para 1.5., it is possible to make a declaration of invalidity based on a right to a name or a personal portrayal, which are special form of general personality rights.[91] Although the protection offered under the trademark law includes personal names and images, provided that they are either registered as trademarks or well-known, it is still not sufficient enough since it does not cover the entire concept of the right of publicity, as discussed in this paper.

Incidental personality rights through the Data Protection Law. Kosovo Law on Protection of Personal Data provides for protection against unauthorized use and disclosure of personal data, and although it does not directly protect personality rights, it confers indirectly a form of legal protection of privacy. The law defines "privacy" as the "respect for private and family life, inviolability of the home and the secrecy of telephone and other communications correspondence, in compliance with the applicable law".[92] Hence, the law protects the

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89 Markicevic Pijevic, M.; Manaj-Zogaj, F., *Trademarks in Kosovo*, Lexology, 2019, https://www.lexology.com/library/detail.aspx?g=6db098c5-b56b-4536-8477-fd1ae54cc2a8#:~:text=Well%2Dknown%20marks%20enjoy%20protection,standards%20established%20in%20international%20treaties (13 May 2022).

90 Art. 7, Law No. 04/L-026 *Ligji për Markat Tregtare* (Law on Trademarks), *Gazeta Zyrtare e Republikës së Kosovës* (Official Gazette of the Republic of Kosovo), No.10/2011.

91 See European Union Intellectual Property Office (EUIPO). Guidelines for Examination of European Union Trademarks: Part D Cancellation, Section 2, Substantive Provisions. PR 878/2012-2, 2017, p. 25, https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/trade_marks/draft-guidelines-2017-wp-lr2/44_part_d_cancellation_section_2_substantive_provisions_clean_lr2_en.pdf. In the case R 878/2012-2 (Michael Jackson case), the Board of Appeals of EUIPO, found that the cancellation applicants have sufficiently proved that the right to one's own image is a special form of personality rights protected under German Law, that use of the contested EUTM by the EUTM proprietor infringes Michael Jackson's image and that the cancellation applicants are entitled to prohibit this use according to German law as developed by established German jurisprudence.

92 Art. 3 (1.23), Law No. 06/L –082 *Ligji për Mbrojtjen e të Dhënave Personale* (Law on

right to privacy rather than publicity rights, thus leaving out of the scope commercial aspects of the use of data of a person. A data subject, whose data has not been used and disclosed in the manner prescribed by the Law on Personal Data, may rely on provisions of LOR to seek compensation of monetary and non-monetary damages.

V. CONCLUSIONS

From the analysis of the existing legal framework in Kosovo, it can be concluded that personality rights are not recognized *per se*, but only indirectly through the right to privacy as guaranteed by the Constitution. Personality rights are mentioned explicitly only in the Law on Obligational Relationships (LOR), and available remedies for unauthorized commercial uses of one's persona can be found in the provisions of LOR governing torts. No other piece of legislation refers explicitly to personality rights, whereas redress for violation of non-commercial aspects of a persona, may be based in several laws.

Whether more regulation in this regard is required, and based on which model, namely the American or European one, the answer to the first part of the question is both affirmative and negative, whereas about the second part of the question, the answer tends to go more in favour of a special law recognizing publicity rights.

There is a need for more regulation of publicity rights in Kosovo, as there have been continuing cases of commercial exploitation of the persona of public figures. Likeness and image of war heroes have been also continuously exploited for both commercial and merchandising purposes, and a more specific regulation should at least precisely define its scope, duration (whether legal protection is available also *post-mortem*; an issue that continues to remain debatable), as well as limitations and exceptions to commercial uses. INTA's "Right of Publicity Minimum Standards" provide a good example of this regulation.

Better regulation of publicity rights would also be beneficial for Kosovo professional sports leagues and athletes, as they could commercially exploit their likeness for greater incomes, which would in turn incentivize further sports development.

Protection of Personal Data), *Gazeta Zyrtare e Republikës së Kosovës* (Official Gazette of the Republic of Kosovo), no. 6/2019.

The draft Civil Code of Kosovo[93] recognizes personality rights in Kosovo and provisions contained in Book II – Obligations, replicate current provisions of LOR, which fall short in terms of defining the scope, duration and exceptions and limitations. On the other hand, publicity rights are recognized as a form of intellectual property rights[94], but despite this recognition one must turn to laws governing other types of intellectual property, such as copyright and trademark, to protect a personality against exploitation. This is also insufficient, because policies and function of right of publicity and other types of intellectual property law vary[95], and in case of Kosovo, neither copyright nor trademark law provide for ample foundation.

Hence, an option would be to either provide more foundations for personality rights in the copyright and trademark laws, with the aim of at least establishing some principal legal sources for the personality rights, or enact a special law on personality rights, adding to the list of IP-related legislations. The latter option seems more extreme considering that no other EU country has opted for this solution, however if publicity/personality rights are to be considered part of intellectual property, than they deserve a special law just like other forms of IP law. Such law would define as to what aspects of person's identity are protectable, must the identity be commercialized or not to be protected, whether publicity rights will continue *post-mortem* or apply only during the lifetime of the individual, and many other important issues that evolve around publicity rights.

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93 Draft Civil Code of Kosovo which can be found at: https://md.rks-gov.net/desk/inc/media/A1CCB78F-9020-41D5-826E-14D67A90F369.pdf.

94 See International Trademark Association (INTA), *Right of Publicity,* https://www.inta.org/topics/right-of-publicity/. According to INTA, the right of publicity is considered an intellectual property right that protects against the misappropriation of a person's name, likeness, or other indicia of personal identities, such as nickname, pseudonym, voice, signature, likeness, or photograph for commercial benefit.

95 See generally Faber, J., *Indiana: A Celebrity Friendly Jurisdiction*, Res Gestae, *vol*. 43, no. 39, 2000, http://www.luminarygroup.com/images/ResGestae_2000-03.pdf.

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Sažetak

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PRAVO PUBLICITETA KAO SREDSTVO ZAŠTITE SLAVNIH I JAVNIH OSOBA NA KOSOVU

*Trenutno ne postoji poseban zakon za zaštitu prava na publicitet na Kosovu, a ograničena zaštita se može pružiti samo kroz različite oblike prava intelektualnog vlasništva, tj. žig i autorsko pravo, kao i zakonima o zaštiti privatnosti i zabrani klevete, te sredstvima imovinskopravne zaštite. Iako pravo na privatnost i zakoni protiv klevete predstavljaju sredstva za zaštitu ljudskog dostojanstva, oni ipak nisu dovoljni da opravdaju primjenu prava na privatnost kada su motivi zaštita komercijalne vrijednosti ličnosti. Stoga ovaj rad ima za cilj analizirati trenutnu regulativu prava na publicitet na Kosovu, kao i opseg zaštite kroz komparativnu analizu zakonodavstva. U radu će se također raspravljati o politikama (*policies*) i pravnim teorijama iza prava na publicitet, istražiti različite pristupe izražene u pravnoj doktrini i predložiti konkretne akcije kosovskim zakonodavcima u tom pogledu.*

Ključne riječi: pravo na publicitet; intelektualno vlasništvo; prava osobnosti; privatnost i publicitet; Kosovo

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